THE DISSEISIN OF CHATTELS.

I.

THE readers of "The Seisin of Chattels," by Professor Maitland, in the "Law Quarterly Review" for July, 1885, were doubtless startled at the outset by the title of that admirable article. But all must have admitted at the end that the title was aptly chosen. The abundant illustrations of the learned author show conclusively that from the days of Glanvil almost to the time of Littleton, "seisin" and "possession" were synonymous terms, and were applied alike to chattels and land. In a word, seisin was not a purely feudal notion.

Is it possible, however, to justify the title of the present article? Is it also a mistake to regard disseisin as a peculiarity of feudalism? History seems to answer these questions in the affirmative. The word "disseisin," it is true, was rarely used with reference to personalty. Only three illustrations of such use have been found,[1] as against the multitude of allusions to seisin of chattels noted by Professor Maitland. In substance, however, the law of disseisin was common to both realty and personalty.

A disseisor of land, it is well known, gains by his tort an estate in fee simple. "If a squatter wrongfully incloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has inclosed. He is seised, and the owner of the waste is disseised. . . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs."[2] Compare with this the following, from Fitzherbert: "Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court;"[3] or Finch's definition: "Trespass in goods is the wrongful taking of them with pretence of title, and therefore altereth the propertie of those goods."[4]

[1] 1 Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Edw. II. 409.

[2] Williams, Seisin, 7. See also Leach *v.* Jay, 9 Ch. Div. 42, 44, 45.

[3] Fitz. Ab. Tresp. 153.

[4] Finch, Law, Book III. c. 6.

This altering of the property by a trespass is pointedly illustrated by a case from the "Book of Assizes."[1] The plaintiff brought a bill of trespass for carrying off his horse and killing it. "The defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was devested out of you and vested in us, and therefore we could not kill our own horse *contra pacem.*" The bill was adjudged bad. Furthermore, incredible as it may appear, a disseisin by theft vested the property in the stolen chattel in the thief. John *v.* Adam[2] was a case of replevin in the *detinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant's hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which Herle, C. J., answered: "Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was." The opinion of this distinguished judge is confirmed by numerous cases in which stolen goods were forfeited by the thief, under the rule of law that gave to the Crown the chattels of felons. The goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels.[3]

These examples are sufficient to bring out the analogy between the tortious taking of chattels and the wrongful ouster from land. But in order to appreciate fully the parallel between disseisin of

[1] 27 Ass. pl. 64. See also Y. B. 2 H. IV. 12–51. There is a legal curiosity in 2 Roll. Ab. 553 [Q] 1, 2. "If my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser and not I; because, by the voluntary putting of the animals there without my consent, he gains a special property for the time, and so for this purpose they are his animals. But, *semble*, if my wife puts my beasts in another's land, I, myself, am trespasser, because the wife cannot gain a property from me."

[2] Y. B. 8 Ed. III. 10–30.

[3] Y. B. 30 & 31 Ed. I. 508, 512, 512–514, 526; Fitzh. Coron. 95, 162, 318, 319, 367, 379, 392; Fitzh. Avow. 151; Dickson's Case, Hetl. 64. Under certain circumstances the victim of the theft might obtain restitution of the goods. But the cases cited in this note show the difficulties that must be surmounted.

chattels and disseisin of land, we must consider in some detail the position of the disseisor and disseisee in each case.[1]

The disseised owner of land loses, of course, with the *res* the power of present enjoyment. But this is not all. He retains, it is true, the right *in rem;* or, to use the common phrase, he has still a right of entry and a right of action. But by an inveterate rule of our law, a right of entry and a chose in action were strictly personal rights. Neither was assignable. It follows, then, that the disseisee cannot transfer the land. In other words, as long as the disseisin continues, the disseised owner is deprived of the two characteristic features of property, — he has neither the present enjoyment nor the power of alienation.

These conclusions are fully borne out by the authorities. "The common law was," as we read in Plowden, "that he who was out of possession might not bargain, grant, or let his right or title; and if he had done it, it should have been void."[2] It was not until 1845 that by statute[3] the interest of the disseisee of land became transferable. Similar statutes have been enacted in many of our States.[4] In a few jurisdictions the same results have been obtained by judicial legislation.[5] But in Alabama, Connecticut, Dakota, Florida, Kentucky, Massachusetts, New York, North Carolina, Rhode Island, and Tennessee, and presumably in Maryland and New Jersey, it is still the law that the grantee of a disseisee cannot maintain an action in his own name for the recovery of the land.[6]

A right of entry and action is now everywhere devisable. But

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[1] For the best discussion of the doctrine of disseisin of land see Maitland "Mystery of Seisin," 2 L. Q. Rev. 481, to which the present writer is indebted for many valuable suggestions.

[2] Partridge *v.* Strange, Plow. 88, per Montague, C. J. See also Doe *v.* Evans, 1 C. B. 717, and 1 Platt, Leases, 50.

[3] 8 & 9 Vict. c. 106, § 6. See Jenkins *v.* Jones, 9 Q. B. Div. 128.

[4] Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, Vermont, Virginia, West Virginia, Wisconsin, Arizona, Idaho, Utah, Wyoming.

[5] Delaware, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas.

[6] Bernstein *v.* Humes (1877), 60 Ala. 582; Conn. Rev. Stat. (1875) 354, § 15; Dak. Civil C. § 681; Doe *v.* Roe (1869), 13 Fla. 602; Russell *v.* Doyle (1886), 84 Ky. 386, 388; Sohier *v.* Coffin (1869), 101 Mass. 179; Rawson *v.* Putnam (1880), 128 Mass. 552, 554; Webster *v.* Van Steenburgh (1864), 46 Barb. 211; Murray *v.* Blackledge (1874), 71 N. Ca. 492; Burdick *v.* Burdick (1884), 14 R. I. 574; Tenn. Code (1884), § 2446.

until 1838 in England and 1836 in Massachusetts, a disseisee had nothing that he could dispose of by will.[1]

If we turn now from transfers by act of the party to transfers by operation of law, we find that in the one case of bankruptcy there was a true succession to the disseisee's right to enter or sue. But this was, of course, a statutory transfer.[2]

There was also a succession *sub modo* in the case of death. The heir of the disseisee, so long as he continued the *persona* of the ancestor, stood in his place. But the succession to the right *in rem* was radically different from the inheritance of the *res* itself. If the heir inherited the land, he became the feudal owner of it, and therefore at his death it descended to his heir, unless otherwise disposed of by deed or will. On the other hand, if a right of entry or action came to the heir, he did not become the absolute owner of the right. He could not hold a chose in action as tenant in fee simple. The right was his only in his representative capacity. He might, of course, reduce the right in action to possession, and so become feudal owner of the land. But if he died without gaining possession, nothing passed to his heir as such. The latter must be also the heir of the disseisee, and so the new representative of his *persona*, in order to succeed to the right *in rem*.

These two cases of death and bankruptcy were the only ones in which the disseisee's right was assignable by involuntary transfer. There was, for example, no escheat to the lord, if the disseised tenant died without heirs, or was convicted of felony. This doctrine would seem to have been strictly feudal. Only that could escheat which was capable of being held by a feudal tenure. A chose in action could not be held by such a tenure. Only the land itself could be so held. But the land, after the disseisin, was held by the disseisor. So long as his line survived, there was no "*defectus tenentis*." The death of the disseisee without heirs was, therefore, of no more interest to the lord than the death of any stranger.[3]

The lord was entitled to seize the land of his villein. But if

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[1] 1 Jarm. Wills (4 ed.), 49; Poor *v.* Robinson, 10 Mass. 131; Mass. Rev. St. c. 62, § 2.

[2] Smith *v.* Coffin, 2 H. Bl. 444.

[3] This principle was not maintained in its full integrity in the time of Coke. See Maitland, 2 L. Q. Rev. 486, 487, where the authorities are fully collected.

the villein had been disseised before such seizure, the lord could not enter upon the land in the possession of the disseisor, except in the name of the villein, and, after a descent cast, could not enter at all.[1] Nor had he any right to bring an action in the name of his villein.[2]

It is still the law in most of our States, as it was in England before 1833,[3] that "if a man seised of land in fee be disseised of the same, and then take a wife and die without reëntering, she shall not have dower."[4]

The husband of a woman who was disseised before the marriage may, of course, enter upon the disseisor in his wife's name, or he may bring an action to recover the land in their joint names; but if the land is not recovered in the one way or the other before his wife's death, he must suffer for his laches. For the old rule, which denied to the husband curtesy in his wife's right of entry or action, has not lost its force on either side of the ocean.[5] It was applied in New York, to the husband's detriment, as recently as 1888.[6]

One more phase of the non-assignability of the disseisee's right of action is shown by another recent case. It was decided in Rhode Island in 1879, in accordance with a decision by the King's Bench, in the time of James I.,[7] that a disseised owner of land had nothing that could be taken on execution.[8]

The position of the disseisor of land is, in most respects, the direct opposite of that of the disseisee. The strength of each is the weakness of the other. The right of the disseisee to recover implies the liability of the disseisor, or his transferee, to lose the land. But so long as the disseisin continues, the disseisor,

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[1] Co. Lit. 118 b.

[2] Co. Lit. 117 a.

[3] 3 & 4 Wm. IV. c. 105.

[4] Perk. § 366; Thompson *v.* Thompson, 1 Jones (N. Ca.), 431; 1 Washb. R. P. (5 ed.) 225, 226.

[5] 2 L. Q. Rev. 486; 1 Bishop, Mar. W. § 509; Den *v.* Demarest, 1 Zab. 525, 542.

[6] Baker *v.* Oakwood, 49 Hun, 416.

[7] Stamere *v.* Amonye, 1 Roll. Abr. 888, pl. 5.

[8] Campbell *v.* Point St. Works, 12 R. I. 452. McConnell *v.* Brown, 5 Mon. 478, *accord.* By statute or judicial legislation a different rule prevails in some jurisdictions. Doe *v.* Haskins, 15 Ala. 619; McGill *v.* Doe, 9 Ind. 306; Blanchard *v.* Taylor, 7 B. Mon. 645; Hanna *v.* Renfro, 32 Miss. 125, 130; Rogers *v.* Brown, 61 Mo. 187 (*semble*); Truax *v.* Thorn, 2 Barb. 156; Jarrett *v.* Tomlinson, 3 Watts & S. 114; Kelley *v.* Morgan, 3 Yerg. 437.

or his transferee, possesses all the rights incident to the ownership of an estate in fee simple. He has the *jus habendi* and the *jus disponendi.* If he is dispossessed by a stranger, he can recover possession by entry or action.[1] If he wishes to transfer his estate in whole or in part, he may freely do so. He may sell the land,[2] or devise it,[3] or lease it.[4] His interest is subject also to the rules of involuntary transfer. Accordingly, it may descend to his heir,[5] escheat to his lord,[6] or be taken on execution,[7] and would doubtless pass to his assignee in bankruptcy. The husband of the disseisor has curtesy,[8] and the wife dower,[9] and a disseisin by a villein must have enured to the benefit of his lord at the latter's election.

The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto.* This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his "usurpation."[10] If the taking was felonious,[11] the despoiled owner might bring an appeal of larceny, and, by complying with certain conditions,[12] obtain restitution of the stolen chattel. But such was the rigor and hazard of

[1] Bract. 165 a; Bateman *v.* Allen, Cro. Eliz. 437, 438; Asher *v.* Whitlock, L. R. 1 Q. B. 1.

[2] Christy *v.* Alford, 17 How. 601; Weber *v.* Anderson, 73 Ill. 439.

[3] Asher *v.* Whitlock, L. R. 1 Q. B. 1; Haynes *v.* Boardman, 119 Mass. 414.

[4] 1 Platt, Leases, 51.

[5] Watkins, Descents (4 ed.), 4, n. (c); Currier *v.* Gale, 9 All. 522.

[6] 2 L. Q. Rev. 487, 488.

[7] Sheetz *v.* Fitzwalter, 5 Barr, 126; Talbot *v.* Chamberlain, 3 Paige, 219; Murray *v.* Emmons, 19 N. H. 483.

[8] Colgan *v.* Pellew, 48 N. J. 27; 49 N. J. 694.

[9] Hale *v.* Munn, 4 Gray, 132; McEntire *v.* Brown, 28 Ind. 347; Randolph *v.* Doss, 4 Miss. 205; 1 Scribner, Dower, 255, 256, 353, 354.

[10] 1 Nich. Britt. 57, 116. The right of self-help in general was formerly greatly restricted. The disseisee's right of entry into land was tolled after five days. If he entered afterwards, the disseisor could recover the land from him by assize of novel disseisin. Maitland, 4 L. Q. Rev. 29, 35. So the writ of ravishment of ward would lie against one entitled to the ward if he took the infant by force from the wrongful possessor. Y. B. 21 & 22 Ed. I. 554. The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem.* 4 L. Q. Rev. 31. A nuisance could be abated by act of the party injured, only if he acted immediately. Bract. f. 233; 1 Nich. Br. 403.

[11] Originally any taking without right, like killing by accident, was felonious. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bract. f. 136 b.

[12] See cases cited *supra*, p. 24, n. 3.

these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.[1] If the taking was not criminal, trespass was for generations the only remedy.[2]

Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost the *res*, but had no right *in rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken.

What became of the chattel afterwards, therefore, was no concern of the victim of the tort. Accordingly, one need not be surprised at the following charge given by Brian, C. J., and his companions to a jury in 1486: "If one takes my horse *vi et armis* and gives it to S, or S takes it with force and arms from him who took it from me, in this case S is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty."[3] Brooke adds this gloss, "For the first offender has gained the property by the tort."[4]

[1] A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are recorded during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviatio Placitorum*, twenty-five cases are given of the single year 1252–1253. We may infer that the writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass rather than by appeal, in order to avoid "*la perilouse aventure de batayles.*" Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, Placita Anglo-Normannica, 89, 89, 98, 102, 127.

[2] In early English law, as in primitive law in general, the principle of parsimony did not permit concurrent remedies. The lines were drawn between the different actions with great sharpness. The right to sue a trespasser in replevin and detinue was a later development, as will be explained further on.

[3] Y. B. 21 Ed. IV. 74–6. See to the same effect Bro. Ab. Ej. Cust. 8, and Tresp. 256; Y. B. 2 Ed. IV. 5–9 *per* Needham, J.; Y. B. 4 H. VII. 5–1; Y. B. 16 H. VII. 3, a–7; Staunf. Pl. Cor. 61, a; Harris *v.* Blackhole, Brownl. 26.

[4] Bro. Ab. Tresp. 358.

The complete divestiture of the owner's property in a chattel by a disseisin explains also a distinction taken in the Year Books, which has proved a stumbling-block to commentators to the present day: "Note by Fineux, C. J., and Tremayle, C. J. If I bail goods to a man and he gives them to a stranger or sells them, if the stranger takes them without livery he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed but by the taking. But if he delivered them to the vendee or donee, then I shall not have trespass."[1] At this time, although anciently the rule was otherwise, the possession of the bailee at will was treated as the possession of the bailor also. In the first case, therefore, where there was no delivery by the bailee, the stranger by taking the goods disseised the bailor and so was liable to the latter in trespass. But in the other case, where the bailee delivered the goods sold, he was the disseisor. By a single act he gained the absolute property in the goods and transferred it to the vendee, who was thus as fully beyond the reach of the disseisee as the vendee of the disseising trespasser in the earlier case before Brian, C. J. The peculiarity in the ease of the bailment lies in the form of the disseisin. But the asportation of a chattel or the ouster from land, although the commonest, were not the only modes of disseisin. Any physical dealing with the chattel under an assumption of dominion, or, to borrow a modern word, any conversion, was a disseisin. The wrongful delivery of the goods by the bailee as vendor corresponds perfectly to a tortious feoffment by a termor. Such a feoffment was a disseisin of the landlord; and the feoffor, not the feoffee, was the disseisor.[2] The act of feoffment was at once an acquisition of a tortious fee and a conveyance.[3]

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be

[1] Y. B. 21 H. VII. 39–49. See also Y. B. 2 Ed. IV. 5–9. 2 Wms. Saund. 47 c; Wright & Pollock, Possession, 169.

[2] Bract. 161 b; Sparks Case, Cro. El. 676; Co. Lit. 57 a, n. (3); Booth, R. Act. (2d ed.) 285; 2 L. Q. Rev. 488.

[3] The conveyance was not necessarily coextensive with the acquisition. If the feoffment was for life the reversion was in the feoffor. Challis, R. Prop. 329.

traced in the expansion of the writs of replevin and detinue, and is sufficiently curious to warrant a slight digression.

Replevin was originally confined to cases of wrongful distress. It was also the only action in those cases, trespass not being admissible.[1] A distrainor, unlike a disseisor, did not take the chattel under a claim of absolute dominion, but only as a security. He had not even so much possession as a bailee. If the distress was carried off by a stranger, the distrainor could not maintain trespass,[2] in which action the goods were always laid as the goods of the plaintiff. That action belonged to the distrainee, as the one disseised. The distrainor must use either the writ of *rescous* or *de parco fracto*, in which the property in the distress was either laid in the distrainee, or not laid in any one. Trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against the custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought.[3] If, therefore, when the sheriff came to replevy goods, as if distrained, the taker claimed them as his own, the sheriff was powerless. The writ directed him to take the goods of the plaintiff, detained by the defendant. But the defendant by his claim had disseised the plaintiff and made them his own. The plaintiff must abandon his action of replevin as misconceived, and proceed against the defendant, as a disseisor, by appeal of felony, or trespass.[4]

Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion,

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[1] Ab. Pl. 265, col. 2, rot. 5; 5 Rot. Par. 139 b.

[2] Y. B. 20 H. VII. 1-1; Rex *v.* Cotton, Park. 113, 121.

[3] Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the "*contrairiositie*" of the supposal of the two writs. Y. B. 8 H. VI. 27–17; 22 H. VI. 15-26; 14 H. VII. 12-32.

[4] 1 Nich. Britt. 138. "If the taker or detainer admit the bailiff to view and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not villein of the deforceor, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." Compare the case of an estray. 1 Nich. Britt. 68. "If the law avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony."

without proof, of ownership. The goods were returned to him as goods wrongfully replevied, and the plaintiff, as before, was driven to his appeal or trespass.[1]

The law was so far changed by the judges in 1331, that if the defendant allowed the sheriff to take the goods, he could not afterwards abate the action by a claim of title.[2]

But it was still possible for the defendant to claim property before the sheriff and so arrest further action by him. To meet this difficulty, the writ *de proprietate probanda* was devised, probably in the reign of Edward III. By this writ the sheriff was directed to replevy the goods, notwithstanding the defendant's claim, if by an inquest of office the property was found in the plaintiff's favor. This finding for the plaintiff had no further effect than to justify the sheriff in replevying the goods, and thus to permit the plaintiff to go on with the replevin action, just as he would have done had the defendant allowed the sheriff to take the goods.[3] Replevin thus became theoretically concurrent with trespass.[4] A disseisor could not thereafter gain the absolute property by his tort. A writ in trespass for carrying off and killing the plaintiff's horse was no longer assailable for repugnancy. In 1440, to a count

[1] Y. B. 21 & 22 Ed. I. 106; Y. B. 32 & 33 Ed. I. 54. If the defendant, instead of claiming title in himself, alleged title in a third person, he could only defeat the action by proof of the fact alleged. Y. B. 32 Ed. I. 82; Y. B. 34 Ed. I. 148.

[2] Y. B. 5 Ed. III. 3-11. The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. See also Y. B. 21 Ed. IV. 64 a-35, and Y. B. 26 H. VIII. 6-27. There is an echo of the old law in Y. B. 7 H. IV. 28 b-5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary — *credo quod non est lex.*"

[3] Y. B. 1 Ed. IV. 9-18.

[4] Y. B. 7 H. IV. 28 b-5, *per* Gascoigne, C. J.; Y. B. 19 H. VI. 65-5, *per* Newton, C. J.; Y. B. 2 Ed. IV. 16-8, *per* Danby, C. J.; Y. B. 6 H. VII. 7-4, *per* Brian, C. J., and Vavasor, J.; Y. B. 14 H. VII. 12-22. In fact, there are no reported cases of replevin for trespass from the time of Edward III. to the present century. See Mellor *v.* Leather, 1 E. & B. 619. Almost at the same time that the scope of replevin was enlarged, there was a similar duplication of remedies against the disseisor of land. Originally, if we except the writ of right, the assize of novel disseisin (or writ of entry in the nature of assize), which was the counterpart of trespass *de bonis asportatis*, was the exclusive remedy against a disseisor. Trespass *quare clausum fregit* was confined to cases of entry not amounting to an ouster. If, therefore, the defendant in a writ of trespass claimed the freehold, the writ was abated. The plaintiff must proceed against him as a disseisor by the assize. 2 Br. Note Book, 378; Ab. Pl. 142, col. 1, rot. 9 [1253]; Ab. Pl. 262, col. 1, rot. 18 [1272]. About 1340, trespass *quare clausum* was allowed for a disseisin. Y. B. 11 & 12 Ed. III. 503-505, 517-519; Y. B. 14 Ed. III. 231.

in trespass for taking a horse, the defendant pleaded that he took it *damage feasant* to his grain, which the plaintiff had carried off. It was objected that the plea was bad, as showing on its face that the grain was the plaintiff's by the taking. But the court allowed the plea on the ground that the defendant might have brought a replevin for the grain which proved the property in him at his election.[1] It became a familiar notion that the dispossessed owner might affirm the property in himself by bringing replevin, or disaffirm it by suing in trespass.[2] In other words, there was a disseisin by election in personalty as well as in realty.

The disseisee's right *in rem*, however, was still a qualified right; for replevin was never allowed in England against a vendee or bailee of a trespasser, nor against a second trespasser.[3] It was only by the later extension of the action of detinue that a disseisee finally acquired a perfect right *in rem*. Detinue, although its object was the recovery of a specific chattel, was originally an action *ex contractu*. It was allowed only against a bailee or against a vendor, who after the sale and before delivery was in much the same position as a bailee. So essential was the element of privity at first, that in England, as upon the Continent, during the life of a bailee, he only was liable in detinue even though the chattel, either with or without the bailee's consent, were in the possession of a third person.[4] In counting against a possessor after the bailee's death, the bailor must connect the defendant's possession with that of the bailee, as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him.[5] Afterwards, a bailor was permitted to charge a sub-bailee in detinue in the lifetime of the bailee.[6] This action seems to have been given to a loser as early as the reign of Edward III.[7] But it was a long time before the averment of the plaintiff's loss of his goods became a fiction. As late as

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[1] Y. B. 19 H. VI. 65–5.

[2] Br. Ab. Replev. 39; Y. B. 6 H. VII. 8 b-4; Y. B. 14 H. VII. 12–22; Russell *v.* Pratt, 4 Leon. 44-46; Bishop *v.* Montague, Cro. Eliz. 824; Bagshaw *v.* Gaward, Yelv. 96; Coldwell's Case, Clayt. 122, pl. 215; Power *v.* Marshall, 1 Sid. 172; 1 Roper, H. & W. (Jacob's ed.) 169.

[3] Mennie *v.* Blake, 6 E. & B. 847.

[4] Y. B. 24 Ed. III. 41 a–22; Y. B. 43 Ed. III. 29–11.

[5] Y. B. 16 Ed. II. 490. But see Y. B. 9 H. V. 14–22.

[6] Y. B. 11 H. IV. 46 b-20; Y. B. 10 H. VII. 7–14.

[7] Y. B. 2 Ed. III. 2–5.

1495, the conservative Brian, C. J., said, "He from whom goods are taken cannot have detinue."[1] His companion, Vavasor, J., it is true, expressed a contrary opinion in the same case, as did Anderson, C. J., in Russell *v.* Pratt[2] (1579), and the court in Day *v.* Bisbitch[3] (1586). But it was not until 1600 that Brian's opinion can be said to have been finally abandoned. In that year the comparatively modern action of trover, which had already nearly supplanted detinue *sur trover*, was allowed against a trespasser; although even then two judges dissented, because by the taking "the property and possession is divested out of the plaintiff."[4] As the averments of losing and finding were now fictions, trover was maintainable by the disseisee against any possessor.

The disseisee's right to maintain replevin and detinue (or trover) being thus established, we have now to inquire how far the rules which were found to govern in the disseisin of land apply to the disseisin of goods.

So long as the adverse possession continues, the dispossessed owner of the chattel has, manifestly, no power of present enjoyment. Has he lost also the power of alienation? His right *in rem*, if analyzed, means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows, then, that they were not transferable. And such was the law.

In 1462, Danby, C. J., and Needham, J., agreed, it is true, that a bailor whose goods had been wrongfully taken from the bailee might give them to the trespasser.[5] This was against the opinion of Littleton, counsel for the plaintiff, who said, "I think it is a void gift; for when S. took them from me [bailee] the property was in him and out of you [bailor]; how, then, could you give them to him?" "*Et bene dixit*," is Brooke's comment.[6] The view of the two judges was taken by Vavasor, J., also, in a like case in 1495. But one of the greatest of English judges, Brian, C. J., expressed himself clearly to the contrary: "The gift is void. . . . In my opinion the property is devested by the taking, and

[1] Y. B. 6 H. VII. 9–4. See also 1 Ch. Pl. (7 ed.) 137.
[2] 4 Leon. 44, 46.
[3] Ow. 70.
[4] Bishop *v.* Montague, Cro. El. 824, Cro. Jac. 50.
[5] Y. B. 2 Ed. IV. 16–8; Perk. § 92.
[6] Bro. Ab. Replev. 39.

then he had only a right of property; and so the property and right of property are not all one. Then, if he has only a right, this gift is void; for one cannot give his right."[1] Three years later he reaffirmed his opinion in the same case: "The gift is void to him who had the goods as much as it would be to a stranger, and I think a gift to a stranger is void in such a case."[2]

In Russell *v.* Pratt[3] (1579) there is this *dictum* by Manwood, C. B.: "If my goods be taken from me, I cannot give them to a stranger; but if my goods come to another by trover, I may give them over to another." The law on this point is thus summarized in "Shepard's Touchstone," the first edition of which was published in 1648: "Things in action are not grantable over to strangers but in special cases. . . . And, therefore, if a man have disseised me of my land or taken away my goods, I may not grant over this land or these goods until I have seisin of them again. . . . And if a man take goods from me, or from another man in whose hands they are; or I buy goods of another man and suffer them in his possession, and a stranger takes them from him, it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me [*i. e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or resumption by recaption]."[4] The bracketed part of this extract was added in 1820 by Preston, the learned editor of the sixth edition. No later allusion to this subject has been found in the English books; but there are several American decisions which might have been given by Brian himself. In McGoon *v.* Ankeny[5] (1850), for instance,

[1] Y. B. 6 H. VII. 9–4. [2] Y. B. 10 H. VII. 27–13.

[3] 4 Leon. 44, 46. See also Rosse *v.* Brandstide, 2 R. & M. R. 438, 439; Benjamin *v.* Bank, 3 Camp. 417.

[4] Shep. Touch. (6 ed.) 240, 241.

[5] 11 Ill. 558. To the same effect, Goodwyn *v.* Lloyd, 8 Port. 237; Brown *v.* Lipscomb, 9 Port. 472; Dunkin *v.* Williams, 5 Ala. 199; O'Keefe *v.* Kellogg, 15 Ill. 347; Taylor *v.* Turner, 87 Ill. 296 (*semble*); Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Young *v.* Ferguson, 1 Litt. 298; Gardner *v.* Adams, 12 Wend. 297; Morgan *v.* Bradley, 3 Hawks, 559; Stedman *v.* Riddick, 4 Hawks, 29; Overton *v.* Williston, 31 Pa. 155.

But see *contra*, Tome *v.* Dubois, 6 Wall. 548; Brig Sarah Ann, 2 Sumn. 206, 211 (*semble*); Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Me. 147; Smith *v.* Kennett, 18 Mo. 154; Hall *v.* Robinson, 2 Comst. 296 (*semble*); Kimbro *v.* Hamilton, 2 Swan, 190.

Compare Holly *v.* Huggerford, 8 Pick. 73; Boynton *v.* Willard, 10 Pick. 166; Carpenter *v.* Hale, 8 Gray, 157, 158; Clark *v.* Wilson, 103 Mass. 219, 222.

the *ratio decidendi* was thus expressed by the court: "While the property was thus held adversely, the real owner had but a right of action against the person in possession, which was not the subject of legal transfer." And the case was followed in Illinois in 1887.[1] Again we read, in Overton *v.* Williston[2] (1858): "If one wrongfully converts the property of another to his own use, and continues in adverse enjoyment of it, the owner cannot sell to a third person, so as to give his vendee a right of action in his own name."

Not much is to be found in the books as to one's power to dispose, by will, of chattels adversely held. It is plain, however, that before 1330 the disseisee had nothing that he could bequeath. At that time the only remedies for a wrongful taking were trespass and the appeal of felony, both of which actions died with the person wronged.[3] A statute in that year gave to the executor an action to recover damages against a trespasser in like manner as the testator might have recovered if living.[4] The executor of a distrainee or bailor could maintain replevin or detinue, as the testator had the property at his death. After these actions were allowed against a trespasser, since the right to maintain them proved property in the dispossessed owner at his election, his executor could use them as well as trespass against a trespasser.[5] It was, however, only a right of action that the executor acquired in such a case. The chattels themselves passed to the executor only when the testator died in possession. An executor counting on his title regularly stated that the testator died seised.[6] In abridging one case, Fitzherbert adds, "And so see that dying seised of goods is material."[7] Finch's statement also is explicit: "All one's own chattels, real . . . or personal, but not those he is only to recover damages for, as in goods taken from him, or to be accounted for, . . . may be given away or devised by his testament."[8]

The analogy between chattels and lands in regard to the assignability of the disseisee's interest holds good also, with one exception, in the case of involuntary transfers. Thus the bank-

[1] Erickson *v.* Lyon, 26 Ill. Ap. 17.
[2] 31 Pa. 155, 160.
[3] Staunf. Pl. Cor. 60, b.
[4] 4 Ed. III. c. 7.
[5] Russell *v.* Pratt, 4 Leon. 44; Le Mason *v.* Dixon, W. Jones, 173.
[6] Y. B. 47 Ed. III. 23–55; Fitz. Ab. Replic. 70; Y. B. 7 H. VI. 35–36; Y. B. 28 H. VI. 4–19. See Hudson *v.* Hudson, Latch, 214.
[7] Fitz. Ab. Replic. 60.
[8] Finch, Law, Bk. 2, c. 15.

rupt's right to recover possession of goods wrongfully taken passes by true succession to the statutory assignee.[1] But it is only a chose in action that passes, not the goods themselves.[2]

In case of death, the administrator represents the *persona* of the intestate, as the heir stood in the place of the ancestor.

The one exception to the parallel between land and goods is the case where the dispossessed owner of a chattel died intestate, leaving no next of kin, or was convicted of felony or outlawed. His right of action vested in the Crown, in the first case as *bonum vacans*, in the others by forfeiture. The king, unlike a feudal lord, claiming by escheat, was a true successor. He was also entitled to choses in action as well as to choses in possession; for the sovereign, whether as assignor or assignee, was an exception to the rule that choses in action are not assignable, unless the claim was for a battery or other personal injury. In 1335 an outlaw who had been pardoned brought an action of trespass for a battery committed before the outlawry. As a pardon did not carry with it a restoration of anything forfeited, it was objected that the claim was extinguished. But the court gave judgment for the plaintiff. Shard (Sharshull, C. J.?) saying, "If this were an action for goods and chattels carried off . . . peradventure it would not be entertained; because if goods had been in the outlaw's possession, the king would have them, and for the like reason, the king should have his action against those who wrongfully took them. But here the wrong would go unpunished if the action were not allowed."[3]

The lord of a villein was entitled to the latter's chattels if he elected to claim them. But he must, at his peril, make his election before the villein was disseised. The villein's chose in action against the disseisor was not assignable.[4]

[1] Edwards *v.* Hooper, 11 M. & W. 363.

[2] "Where the conversion takes place before the bankruptcy, the assignees have a right of action, but have not the property in the goods." Lord Abinger, in Edwards *v.* Hooper, 21 L. J. Ex. 304, 305. The learned Chief Baron evidently used "property" as Brian, C. J., did, in contradistinction to right of property.

[3] Y. B. 29 Lib. Ass. pl. 63. See also Y. B. 6 H. VII. 9-4, and 10 H. VII. 27-13.

[4] "If the beasts of my villein are taken in name of distress, I shall have a replevin, although I never seized them before, for the property is in my villein, so that suing of this replevin is a claim which vests the property in me. But it is otherwise if he who took the beasts claimed the property." Fitz. Ab. Replevin, 43. Coke, following Fitzherbert, says: "If the goods of the villein be taken by a trespass, the lord shall have no replevin, because the villein had but a right." Co. Lit. 145 b.

There is nothing in the law of personalty corresponding to dower in land. But the husband's right to his wife's chattels may be compared to his right of curtesy in her land. As was seen, the husband of a woman who was not seised of the land during the marriage was not entitled to curtesy. So a man who married a disseisee of chattels acquired no interest therein, unless during the marriage he reduced her right *in rem* to possession by recaption or by action in their joint names. Her right of action, in other words, was no more assignable than that of a villein. Fitzherbert treated the two cases as illustrations of the same principle.[1] The doctrine was clearly stated by the court in Wan *v.* Lake.[2] "If the wife had been dispossessed [of the term] before marriage, and no recovery during the coverture, the representative of the wife should have the term and not the husband, because it is then a chose in action." The rule has been applied, in a number of cases, to chattels personal.[3]

Finally, the disseisee of a chattel, like the disseisee of land, has at common law nothing that can be taken on execution. In a valuable book published in 1888 we read: "When personal property is held adversely to its owner, his interest therein is a mere chose in action and cannot be reached by execution, unless by the provisions of some statute."[4]

The position of the disseisor of a chattel was the converse of that of the disseisee. The converter, like the disseisor of land, had the power of present enjoyment and the power of alienation. If dispossessed by a stranger, he might proceed against him by trespass, replevin, detinue, or trover.[5] He could sell the

[1] Fitz. Ab. Replevin, 43.

[2] Gilb. Eq. 234. See also Co. Lit. 351 a, b; 4 Vin. Ab. 53; Y. B. 20 Ed. I. 174; Milne *v.* Milne, 3 T. R. 627.

[3] Magee *v.* Toland, 8 Port. 36 (*semble*); McNeil *v.* Arnold, 17 Ark. 154, 178 (*semble*); Fightmaster *v.* Beasley, 1 J. J. Marsh. 606; Duckett *v.* Crider, 11 B. Mon. 188, 191 (*semble*); Sallee *v.* Arnold, 32 Mo. 532, 540 (*semble*); Johnston *v.* Pasteur, Cam. & Nor. 464; Norfeit *v.* Harris, Cam. & Nor. 517; Armstrong *v.* Simonton, 2 Tayl. 266, 2 Murph. 351, S. C.; Spiers *v.* Alexander, 1 Hawks, 67, 70 (*semble*); Ratcliffe *v.* Vance, 2 Mill, Const. R. 239, 242 (*semble*); Harrison *v.* Valentine, 2 Call, 487, cited. See also 1 Bishop, Mar. Wom. § 71. But see *contra*, Wellborne *v.* Weaver, 17 Ga. 267, 270 (*semble*); Pope *v.* Tucker, 23 Ga. 484, 487 (*semble*).

[4] Freeman, Executions (2d ed.), s. 112. See to the same effect Wier *v.* Davis 4 Ala. 442; Horton *v.* Smith, 8 Ala. 900; Doe *v.* Haskins, 15 Ala. 620, 622 (*semble*); Thomas *v.* Thomas, 2 A. K. Marsh. 430; Commw. *v.* Abell, 6 J. J. Marsh. 476.

[5] Bro. Ab. Tresp. 433; Maynard *v.* Bassett, Cro. El. 819; Woadson *v.* Newton, 2 Str. 777.

chattel[1] or bail it.[2] It would go by will to the executor or be cast by descent upon the administrator;[3] was forfeited to the Crown for felony;[4] and was subject to execution. A conversion by the wife, unless the property was destroyed, was necessarily to the use of the husband,[5] as a disseisin by a villein must have profited his lord if the latter claimed it.

We have thus far considered only the resemblances between land and chattels in the matter of seisin and disseisin. But our comparison would be incomplete if attention were not called to one point of difference. One in possession of a horse or cow was seised of the chattel itself, without more. There could, therefore, be but a single seisin of it at any given moment. If, for instance, a chattel was loaned for a term, the bailee alone was seised of it. He, and he only, could be disseised of it. To this day the bailor for a term cannot maintain trespass or trover against a stranger for a disseisin of the bailee. But, on the other hand, there was no such thing as seisin of land *simpliciter*. The seisin was always qualified by the mode of possession. One was seised either *ut de feodo vel libero tenemento*, or else *ut de termino*. Accordingly, wherever there was a term there were necessarily two distinct seisins in one and the same land, at one and the same time. Both of these seisins were lost by the tortious entry of a stranger upon the land under a claim of right, and the disseisor was exposed to two actions, — the assize of novel disseisin by the freeholder, and the *ejectio firmæ* by the termor. This difference between land and chattels is obviously artificial and of feudal origin.

But if this historical sketch has been accurately drawn, the disseisin of land finds its almost perfect counterpart in the conversion of chattels, notwithstanding the difference here indicated. It is still true that the doctrine of disseisin belongs not to feudal-

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[1] James *v.* Pritchard, 7 M & W. 216; Bigelow, Estoppel (4th ed.), 489, 490; Bohannon *v.* Chapman, 17 Ala. 696.

[2] Shelbury *v.* Scotsford, Yelv. 23; Bigelow, Estoppel, 490.

[3] Norment *v.* Smith, 1 Humph. 46, Moffatt *v.* Buchanan, 11 Humph. 369, are *contra*. But these decisions seem indefensible.

[4] *Supra*, p. 24, n. 3; Y. B. 6 H. VII. 9-4.

[5] Hodges *v.* Sampson, W. Jones, 443; Keyworth *v.* Hill, 3 B. & Ald. 685. In Tobey *v.* Smith, 15 Gray, 535, a count alleging a conversion by the wife of A to their use was adjudged bad on demurrer. The conversion should have been laid to the use of the husband only.

ism alone, but to the general law of property. In a subsequent paper, the writer will endeavor to show that this doctrine is not a mere episode in English legal history, but that it is a living principle, founded in the nature of things, and of great practical value in the solution of many important questions.

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[*To be continued.*]